STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: DEFINING THE TERM “ALL ELIGIBLE CUSTOMERS” IN IOWA CODE § 476.29(5)	DOCKET NO. RMU-03-7

ORDER TERMINATING RULE MAKING PROCEEDING

(Issued February 6, 2004)

On June 6, 2003, the Utilities Board (Board) issued an order commencing rule making to receive public comment concerning proposed amendments to 199 IAC 22.1(3) and (5) intended to further define the term “all eligible customers” as used in Iowa Code § 476.29(5). The proceeding was identified as Docket No. RMU-03-7. The proposed amendments were intended to require each local exchange carrier to offer service to all residential and business customers in any exchange area served, unless excepted from the requirements pursuant to Iowa Code § 476.29(5). The "Notice of Intended Action" was published in the IAB Vol. XXV, No. 26 (6/25/03) p. 1673, as ARC 2549B. Written statements of position were filed on or before July 15, 2003, and an oral presentation was held on August 12, 2003.

Written statements of position were filed by the Rural Iowa Independent Telephone Association (RIITA), the Iowa Telecommunications Association (ITA), Qwest Corporation (Qwest), AT&T Communications of the Midwest, Inc. (AT&T),

MCI, Inc. (MCI), Sprint Communications, L.P. (Sprint), MCC Telephony of Iowa, Inc. (Mediacom), and the Consumer Advocate Division of the Department of Justice (Consumer Advocate).

The Board has summarized the comments below and provides an analysis that addresses the proposed amendment.

SUMMARY OF COMMENTS

1. RIITA

RIITA supports the proposed rule changes. RIITA's concern with the current rule is that because incumbent local exchange carriers (ILECs) are required to serve all customers in an exchange, if competitive local exchange carriers (CLECs) are allowed to compete only for the most profitable customers, the ILEC could be left serving just the high-cost customers. That result could threaten the availability of phone service in an entire exchange. (Tr. 5-6.) RIITA suggests that some universal service fund mechanism needs to be developed to compensate the carrier of last resort unless competitors are required to serve the entire exchange in order to prevent a regulatory burden from being placed on one competitor that isn't placed on other competitors. (Tr. 14-15.) RIITA asserts that the issue for the Board to consider is how to deregulate currently regulated markets, while preserving the concept that basic telephone service should be available to everyone at reasonable rates. (Tr. 24.)

2. ITA

The ITA argues that the rule changes simply clarify the statute and its past application by the Board, arguing that this is a case of applying equitable economics and regulation. A number of ITA companies recently made substantial capital investments to broaden service in outlying areas under the assumption that previous practices would continue. (Tr. 44.) ITA members have certain exchange boundaries that include both high-cost and low-cost customers. ITA expressed concern that competitors using new technology could draw their own exchange boundaries to create a competitive advantage. (Tr. 45.) Although ITA is in favor of competition, it is concerned that the immediate lifting of all current rules would allow the new entrants to cherry-pick, strongly disadvantaging the small incumbents for the investments in plant they have made. (Tr. 46.)

3. Qwest

Qwest asserts the proposed changes can only be described as harmful to competition, suggesting that a new entrant would think twice about building facilities if it had to serve everyone in an entire exchange. Qwest reasons that the effect of the rule changes would be to permit the incumbent to pick the service territory of the new entrant. Thus new entrants would be inclined to locate to other states where they could pick their customers, markets, and geographical territory. (Tr. 16-18.)

Qwest reiterates its belief that the Board's early decision requiring the City of Hawarden to serve the entire exchange (Docket No. TCU-96-2) is nonsensical in a climate of competition. Qwest opines that both Iowa and federal law are years beyond the type of protection the Board provided in its Hawarden decision. The City

of Hawarden is trying to serve residents within city limits, not residents in rural areas outside the city.

Qwest views current laws as requiring the Board to consider competition in its orders and rulings (Tr. 19-20) and is concerned that the proposed rule attempts to treat each company as if it were a monopoly; if a company serves one it must serve everybody. According to Qwest, this thinking is out of date and the proposed rule is inappropriate (Tr. 23) contending the industry needs competition and freer markets, not more regulation. (Tr. 30.)

4. AT&T

AT&T states the rule changes are based on the false premise that allowing CLECs to serve only business customers is anti-competitive. AT&T points out that the order commencing the rule making did not provide any data to support this premise, while data from the Federal Communications Commission (FCC) demonstrates that the level of Iowa competition is anything but robust. According to FCC data cited by AT&T, in Iowa, 21 percent of ILEC access lines serve large business customers, while 13 percent CLEC access lines serve such customers, suggesting that CLECs in Iowa are at a competitive disadvantage in serving large business customers. (Tr. 57.)

AT&T notes that Iowa Code § 476.95 states that communications services should be available from a variety of providers, arguing that this requires the Board to move prices towards costs and provide customers with competitive choices. According to AT&T, the rule changes would do just the opposite by delaying the development of competition as envisioned by the Iowa legislature. (Tr. 58.)

AT&T also suggests the rule changes won't be effective because the changes seek to require carriers to serve all residential and business customers, but the mechanism for offering such services is through the filing of tariffs. AT&T argues that because CLECs are not rate-regulated, the Board cannot control the rates for CLEC services. Therefore, a CLEC may be able to avoid the requirement to serve all eligible customers through its rate design. (Tr. 59.) AT&T further suggests that there is no provision for the Board to mandate the service offerings of CLECs entering a new market in Iowa Code § 476.101(1), the local exchange competition statute. (Tr. 61.)

Finally, AT&T asserts the rule changes violate section 253 of the Federal Communications Act of 1996, which provides that no state law may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. AT&T suggests the rule changes would impose an additional obligation on CLECs, the effect of which is not competitively neutral, thus having the effect of prohibiting the ability to provide telecommunications service. (Tr. 60.)

5. MCI

MCI suggests the proposed rules would create a substantial barrier to market entry by requiring a competitor to compete with the ILEC in the least profitable locations in order to be permitted to provide service in Iowa. MCI contends that in light of Iowa unbundled network element (UNE) rates, the rule changes could mean that a competitor would be forced to operate at a loss.[1]

[1] See Comments of MCI, Inc., Docket No. RMU-03-7, filed July 15, 2003, p. 3.

6. Sprint

Sprint agrees with the comments of Qwest, AT&T, and MCI. Sprint notes that its own service preference is residential-only, but the Board recently ordered it to add a business service. Sprint contends that the rule changes appear to target an opposite scenario from its own circumstance; one where a carrier cherry-picks business customers and offers no residential service. Sprint questions whether its residential-only offering should be considered a violation of the proposed rules. (Tr. 67.)

Sprint suggests the original intent of the § 476.29(5) requirement to serve all eligible customers may not have been a requirement to serve both residential and business customers. Instead, it may have been a nondiscrimination requirement. In that case, it would mean that a residential provider of service in a certain area of Iowa must be prepared to serve all residential customers in that area, not all residential and business customers, alike. (Tr. 68-69.)

7. Mediacom

Mediacom's concern relates to the impact of the proposed rule change on intermodal competition questioning whether the rule change would require it to provide service within the traditional telephone exchange boundaries or whether Mediacom could provide service within its established cable network boundaries. (Tr. 71.)

8. Consumer Advocate

Consumer Advocate urges the Board not to adopt the rules, noting that the public policy requires the development of meaningful and effective competition so

consumers will receive telecommunications services of higher quality and at lower rates. According to Consumer Advocate's comments, imposing requirements upon new entrants to serve customers they would not otherwise choose to serve would not advance the development of competition. Instead, the Board should continue to exclude CLECs from the requirement to serve all eligible customers on a case-by-case basis as it has done in the past. (Tr. 73-74.)

BOARD ANALYSIS

There are two aspects to the proposed rule changes. First is the customer class aspect, which is addressed in the following proposed definition under 199 IAC 22.1(3):

> "Eligible customers" means all residential and business customers located within the carrier's certificated exchange service area.

As rationale for the proposed definition, the order commencing rule making stated the need for further definition of the terminology used in Iowa Code § 476.29(5) with the emergence of local exchange competition. The new definition was intended to discourage competitive carriers from providing service to only one class of customers and developing a competitive advantage over other carriers.

The second aspect is geographic, which was addressed by the addition of the word "exchange" in 199 IAC 22.1(5). The proposed changes to the rule are as follows:

> Basic utility obligations. Each telephone utility shall be prepared to provide telephone service to ~~the public~~ all eligible customers in its exchange service area in accordance with its rules and tariffs on file with the board. Such service shall normally meet or exceed the standards

> set forth in these rules governing "Rates Charged And Service Supplied By Telephone Utilities."

The order commencing rule making states that the intent of these rule changes is for carriers to offer service to all residential and business customers in any "exchange area served."

RIITA and ITA favor the rule changes principally for two reasons. First, strict enforcement of the rule would probably assist ILECs in maintaining traditional market share. It would discourage competitive LECs from targeting only low-cost or high-revenue customers in selected portions of an exchange. This first reason alone, however, could also be characterized as anti-competitive, as pointed out by Qwest, Consumer Advocate, and the other competitive carriers. These parties generally agree that the Board should be moving away from policies that discourage market entry and towards the pro-competitive policies pursuant to Iowa Code § 476.95.

What those opposed to the rule changes do not acknowledge is any need for a road map to assist the Board, the ILECs, and the CLECs, while moving from regulation to competition. RIITA acknowledges this need as a second reason for supporting the rule changes. RIITA notes that economic studies addressing deregulation of previously regulated markets conclude that regulators must carefully specify an entrant's service requirements. Failure to do so, according to RIITA, allows entrants to provide service only to the most profitable customers. Accordingly, RIITA suggests that regulators should create symmetric service obligations or provide a common fund to compensate the incumbent LEC for the full cost of satisfying its universal service obligation. (Tr. 28.)

Thus, according to RIITA, if the Board were to relax implementation of § 476.29(5), it could harm not only an ILEC's market share, but the availability of basic telephone service also. RIITA acknowledges, however, that § 476.29(5) is a "general rule" requiring carriers to provide service to all requesting customers in an exchange. At the same time, the statute allows the opportunity for carriers to come to the Board and make the case that this service requirement should be modified. (Tr. 71.)

The Board notes that rules implementing Iowa Code § 476.29 were adopted in 1992.[2] Subrule 199 IAC 22.20(4), adopted at that time, provides perspective for this current rule making. The rule states:

> Subsequent certificates. Any legal entity which desires to serve all or a portion of a territory which is currently assigned to another land-line utility may petition for a new certificate or a certificate modification depending upon whether the utility already has a certificate to serve. After notice to affected utilities and opportunity for hearing, the board will determine whether the new certificate or certificate modification will promote the public convenience and necessity. <u>If the new or modified certificate is granted, the result may be two or more utilities serving all or a portion of an assigned territory.</u> (emphasis added)

Thus, the Board's rules contemplate granting certificates to telephone utilities that propose to serve only a portion of an exchange. However, the Board will grant such certificates only if it is in the public interest. Based on this rule and the comments received in this docket, it would be inappropriate to expand the requirements of § 476.29(5) at this time.

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[2] See *Order Adopting Rules Without Notice*, Docket No. RMU-92-6, issued July 2, 1992, and *Order Adopting Rules*, Docket No. RMU-92-7, issued December 2, 1992.

Subrule 199 IAC 22.20(4) provides an appropriate road map for moving from regulation to competition without any additional changes to 199 IAC 22.1(3) or (5). This road map serves equally well for either an ILEC concerned about its universal service obligation or a CLEC concerned about providing an innovative service to a limited group of customers. In either case, the rule prescribes that the public interest must be served in determining a carrier's service obligation. Therefore, the Board will terminate this proceeding without adopting any changes to the current rule.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The rule making initiated in the "Notice of Intended Action" published in the IAB Vol. XXV, No. 26 (6/25/03) p. 1673, as ARC 2549B, is terminated.

2. The Executive Secretary is directed to submit for publication in the Iowa Administrative Bulletin a notice form attached to and incorporated by reference in this order.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Sharon Mayer
Executive Secretary, Assistant to

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 6th day of February, 2004.

UTILITIES DIVISION [199]

Notice of Termination

Pursuant to the authority of Iowa Code section 17A.4(1)"b," the Utilities Board (Board) gives notice that on February 6, 2004, the Board issued an order in Docket No. RMU-03-7, In re: Defining the Term "All Eligible Customers" in Iowa Code § 476.29(5), "Order Terminating Rule Making." The rule making was commenced on June 6, 2003, pursuant to Iowa Code sections 17A.4, 476.1, 476.2, and 476.29 and published in IAB Vol. XXV, No. 26 (6/25/03) p. 1673, as ARC 2549B. The Board commenced the rule making to receive public comment on proposed changes to 199 IAC 22.1(3) and 199 IAC 22.1(5) to incorporate a definition of the term "eligible customers" as used in Iowa Code § 476.29(5).

Written statements of position were filed by the Rural Iowa Independent Telephone Association (RIITA), the Iowa Telecommunications Association (ITA), Qwest Corporation (Qwest), AT&T Communications of the Midwest, Inc. (AT&T), MCI, Inc. (MCI), Sprint Communications, L.P. (Sprint), MCC Telephony of Iowa, Inc. (Mediacom), and the Consumer Advocate Division of the Department of Justice (Consumer Advocate). An oral presentation was held on August 12, 2003.

The Board's order issued concurrently with this notice, discusses the comments and support for the Board's decision to terminate the rule making. The order can be

found on the Board's Web site at www.state.ia.us/iub. The Board found that the proposed amendment to the current rule is inconsistent with policies to further competition.

Pursuant to the authority of Iowa Code section 17A.4(1)"b," the Board hereby terminates the proposed rule making published in IAB Vol. XXV, No. 26 (6/25/03), p. 1673, as ARC 2549B.

February 6, 2004

/s/ Diane Munns
Diane Munns
Chairman